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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 709

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and JOHN S. GORSUCH and ALBERT J. DOIG, *Petitioners*

v.

ANGUS J. DEPINTO, HJALMAR B. LANDOE, FRANCIS I. SABO, EDWIN B. PEGRAM and ELMER W. DUHAME, *Respondents*

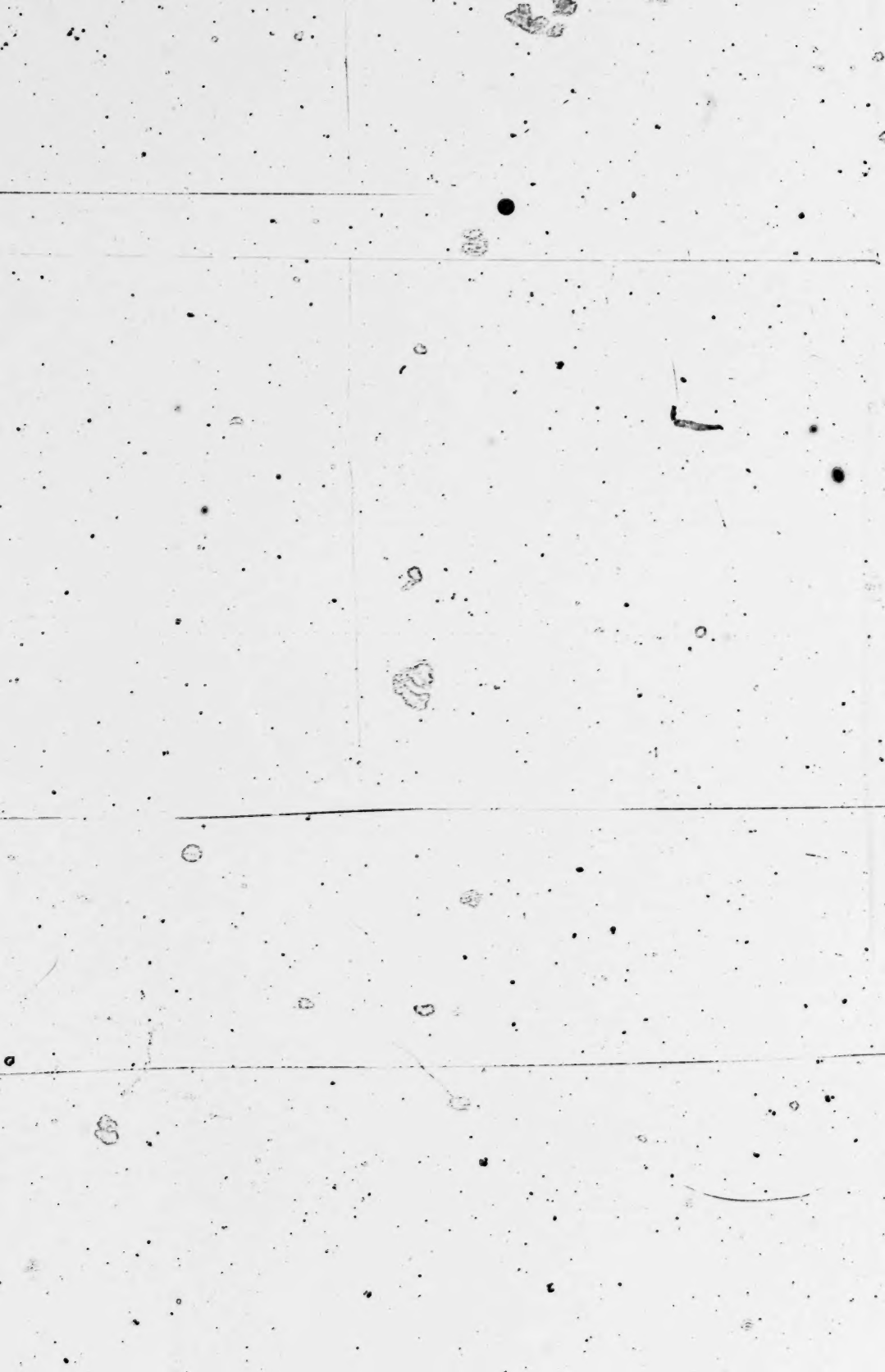
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES WM. MOORE
127 Wall Street
New Haven, Connecticut

WILLIAM LEE MCLANE
NOEA MCLANE
2101 Connecticut Avenue, N. W.
Washington, D. C.

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Federal Rules Provisions Involved	2
Statement	3
Reasons for Granting the Writ	9
I. There is no common law right to a jury trial in a stockholder's derivative action under the Seventh Amendment, the Federal Rules, or statute. The reasoning of the court of appeals would give a Constitutional right to jury trial in all actions within equity's concurrent jurisdiction, and as to many issues in bankruptcy and admiralty. This enlargement is believed to be unwarranted, but, if it is to be the rule, it should be sanctioned by this court only after full consideration	10
1. The Seventh Amendment preserves a jury trial only in suits at common law	11
2. The stockholder's suit is solely an invention of equity and not within the Seventh Amendment	13
3. The Federal Rules neither enlarged nor abridged jury trial, and there is no statutory right in a stockholder's derivative action	14
4. This Court's decisions under the Federal Rules have preserved jury trial without enlarging the scope of the Seventh Amendment	15
5. The reasoning of the court of appeals enlarges the scope of the Seventh Amendment to include actions within equity's concurrent jurisdiction, bankruptcy proceedings, and suits in admiralty	20
6. If there is to be enlargement of the right to jury trial it should be done by Congress rather	

Page

than the lower federal courts misconstruing the Seventh Amendment 21

II. Neither the Seventh Amendment nor the principles of additur prevent a district court from granting plaintiff judgment under Civil Rule 50(b) where there is no genuine factual issue as to defendants' liability or the amount of damages. This rule applies even though a jury has returned a lesser verdict or has discharged the defendants 22

Conclusion 26

Appendix A (Opinion of district court below) 1a

Appendix B (Opinion of court of appeals and judgment below) 9a

Appendix C (Statutes involved) 32a

AUTHORITIES CITED

Cases:

Aunet v. Black, 234 F. 2d 42 18

Beacon Theatres, Inc. v. Westover, 259 U. S. 500 ..... 10, 15, 16, 17

Berry v. U. S., 312 U. S. 450 24

Dairy Queen, Inc. v. Wood, 369 U. S. 469 ..... 10, 15, 16, 17

Dimick v. Schiedt, 293 U. S. 474 ..... 10, 22, 23

Dodge v. Woolsey, 18 How. 331 13

Fitzpatrick v. Sun Life Assurance Co., ... DC N.J. 1941 19

Fleitman v. Welsbach Street Lighting Co., 240 U. S. 27 13

Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494 24

Maggio v. Zeitz, 333 U. S. 56 20

Meeker v. Ambassador Oil Corp., — U. S. — 10, 17

Mutual Benefit Health Ass'n v. Thomas, 123 F. 2d 353 25

United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261 13

United States v. Wonson, 28 Fed. Cas. 745 11

Page

CONSTITUTION, STATUTES AND RULES:

Constitution of the United States
- Amend. VI 11
- Amend. VII 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 20, 21, 22, 25

Federal Rules of Civil Procedure
- Rule 23(b) 3, 14
- Rule 38(a) 14, 16
- Rule 39(a)(2) 15
- Rule 42(b) 15
- Rule 50(b) 2, 4, 5, 7, 8, 9, 22, 24, 25, 26
- Rule 57 15
- Rule 59 24

28 U.S.C. 1254(1) 2
28 U.S.C. § 1332 3

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Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the district court is unreported. It is found in Appendix A, infra, pp. 1a-9a and at pages 310-320 of the record. The opinion of the court of appeals is reported at 323 F. 2d 826 and is found in Appendix B, infra, pp. 9a-31a.

JURISDICTION

The judgment of the court of appeals was entered October 1, 1963 (App. B, infra, p. 31a). On November 20, 1963, the court of appeals denied the petitions for rehearing filed by Respondents DePinto and Duhame. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether, as the court of appeals ruled, the Seventh Amendment's preservation of a right to jury trial in "suits at common law" extends to defendants in a stockholder's derivative action (a class action and an invention of equity unknown to the common law) with respect to any claim asserted in such an equitable action which, *if* it had been asserted in a direct action by the corporation, would be cognizable in a suit at common law?

Whether, as the court of appeals held without reviewing the evidence, the Seventh Amendment and the principles of additur enunciated by the Supreme Court prohibit a district court, under Civil Rule 50(b), from entering a judgment—notwithstanding the verdict in accordance with plaintiff's motion for a directed verdict, where the district court finds that there is no genuine issue of triable fact both as to defendants' liability *and* the amount of damages?

AMENDMENT TO THE CONSTITUTION AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The Seventh Amendment to the Constitution of the United States and Rule 50(b), Federal Rules of Civil Procedure, are involved. Both are set forth in Appendix C.

STATEMENT

As held by the court of appeals in the first appeal,[1] this is a stockholder's derivative action. The complaint was filed on November 4, 1958. Subsequently, many depositions were taken, several pretrial conferences were held, and an extended pretrial conference order was signed. (R. 221-293). The trial, conducted by District Judge George H. Boldt, consumed eight days from March 9, 1960 until March 18, 1960. (R. 381, 1289). Plaintiff called sixteen witnesses to testify; defendants called none. Eighty-four exhibits were admitted into evidence, on plaintiff's tender.

Both the complaint and the amended complaint set forth a class action (shareholder's derivative suit), and were filed pursuant to Civil Rule 23(b). Jurisdiction was founded on 28 U.S.C. § 1332. The original plaintiff, Gorsuch, was a shareholder of United Security Life, an Arizona stock life insurance corporation which was the corporate defendant. Most of the individual defendants were either officers or directors of United, and among the defendants were the Respondents Sabo, Pegram, and Landoe, the Montana group, and Respondents DePinto and Duhame, from Arizona. Plaintiff shareholder's claim was to recover for United the loss of $314,794.19[2] alleged to have been caused by Respondents through breach of fiduciary duty or negligence.

[1] Niesz v. Gorsuch, 259 F. 2d 909 (9th Cir. 1961).

[2] All parties stipulated in a pretrial conference order that $308,000 of specific assets belonging to United had been transferred on October 18, 1957 to American, the agent of Sabo, Pegram and Landoe, who then immediately delivered the $308,000 in assets to James E. Kelly, a close friend of DePinto and Duhame. (R. 237-238). In addition to the $308,000 in cash, bonds, and mortgages,